

Cooperation between member states and Europol

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Abstract

Within this study, we have examined the way in which the Europol national units were regulated in the European normative act and the regulation of the two forms of judicial assistance in criminal matters, namely joint investigation teams and liaison officers. The research also included the way in which the Romanian legislator transposed into its internal law the provisions of the European legislative act. Another subject of the research was the formulation of critical views and de lege ferenda proposals, both for the European and for the Romanian law. The novelty elements that are promoted through this study aim both at examining the European legal instrument, the way it is transposed into the Romanian law, as well as the critical opinions and de lege ferenda proposals, proposing to contribute to the improvement of the European and Romanian normative system in this domain. The present study should be viewed as a follow-up to the one previously published, completing the examination of this European institution with a key role in preventing and combating transnational crime at European level. The work may be useful for students and master students of law faculties, practitioners in the field, as well as the European and Romanian legislators in terms of amending and completing the current legislative system.

Keywords: *joint investigation teams; liaison officers; Europol national units; European Union.*

JEL Classification: K14; K33

1. Introduction

In the 1/2017 issue of the *Juridical Tribune – Tribuna Juridica* Journal we have published the study entitled “Europol objectives and tasks in the construction of the European Union. Some critical opinions and proposals”, where we have highlight the importance of Europol in preventing and combating cross-border crime in the European Union, insisting on presenting the objectives and attributions of this European institution.²

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² Bogdan Birzu, *Europol objectives and tasks in the construction of the European Union. Some critical opinions and proposals*, „Juridical Tribune – Tribuna Juridica”, volume 7, issue 1, June 2017, pp. 157-166.

In the study we highlighted the causes that led to the movement of people and goods from one state to another in Europe, the positive effects for economic growth, but also the negative effect at the level of the proliferation of crime.³

At the same time, citing the doctrine in the field, we have also highlighted the increase in domestic criminality at European level.⁴

On this background, the establishment of EUROPOL has been a pressing need to contribute to ensuring that one of the fundamental objectives set by the Union is achieved, namely to ensure an area of freedom security and justice.

We have also insisted on the legislative developments concerning the organization and operation of the institution, in particular those aimed at simplifying and improving the way in which we organize and operate, by extending the possibilities to assist and support the judicial authorities of the Member States in carrying out their attributions specific to preventing and combating cross-border crime.⁵

At the same time, in order to improve the provisions of the European law we have formulated some critical opinions and *de lege ferenda* proposals.⁶

We continue to examine this particularly important institution with major tasks in the complex prevention and fight against crime at European Union level, analyzing how the European legislator⁷ has designed cooperation between Member States and Europol, with the presentation of critical opinions aimed at contributing to the improvement European legislative system in this area.

2. Cooperation between member states and Europol

According to the provisions of the Framework Legislative Act, Europol has been set up and operates as an EU entity funded by the general budget of the Union to support and strengthen the work of the competent authorities of the Member States and their mutual cooperation in order to prevent and combat organized crime and terrorism and other forms of crime affecting two or more Member States.

From this perspective, it can be easily understood that Europol, a European institution with complex tasks in the general context of preventing and combating cross-border crime, is currently the focal point for cooperation activities between Member States in this field.

³ Ion Rusu, Minodora-Ioana Balan-Rusu, *The European Arrest Warrant, Romanian and European Legislation, Doctrine and Jurisprudence*, LAP Lambert Academic Publishing, Danubius University, Saarbrücken, Deutschland/Germany, 2013, p. 12

⁴ *Ibidem*, p. 12.

⁵ Ion Rusu in Alexandru Boroî (coord.), Ion Rusu, Minodora-Ioana Rusu, *Tratat de cooperare judiciară internațională în materie penală/Treaty of international judicial cooperation in criminal matters*, C. H. Beck Publishing House, Bucharest, 2016, pp. 937.

⁶ Bogdan Birzu, *op. cit.*, pp. 164-165.

⁷ We refer directly to Regulation (EU) of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law-Making Cooperation (Europol) and replacing and repealing Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, published in the Official Journal of the European Union, L 135/53 of 24.5.2016.

In the complex work of cooperation between Member States, Europol is involved in carrying out concrete activities to support the judicial bodies of the Member States, including: joint investigation teams and liaison officers.

Europol also has the power to request the initiation of criminal investigations in the territory of some Member States.

We will continue to examine these forms of judicial cooperation in criminal matters between Europol and the competent judicial bodies of the Member States.

2.1 Participation in joint investigation teams. Requests by Europol for the initiation of criminal investigations

A first form of cooperation between Europol and the Member States represented by their competent judicial bodies is represented by participation in joint investigation teams.

According to the provisions of the European legal instrument, Europol staff can participate in the activities of the joint criminal intelligence teams that are in line with Europol's objectives, which were examined in the previously published study, to which we refer.⁸

The establishment of joint investigation teams shall take place on the basis of a contract setting out the conditions for the participation of Europol staff in the team, including information on the norms relating to liability.

Within the legal acts of the Member States in which a joint investigation team operates, Europol staff may assist all activities and exchange of information with all members of the joint investigation team.

Taking into account the provisions of the European legal instrument which refers to the "normative acts with legal power", for Romania, these normative acts are the acts adopted by the Romanian Parliament, the ordinances and the emergency ordinances of the Government.

This finding is required by the Judgments of the Constitutional Court no. 405 of 15 in 2016 on the exception of the unconstitutionality of the provisions of art. 246 of the Criminal Code of 1969, art. 297 par. (1) of the Criminal Code and of art. 132 of Law no. 78/2000 on the prevention, detection and sanctioning corruption acts.⁹

On the basis of the provisions of the European framework legal instrument, Europol staff participating in a joint investigation team may make available to all members of the team the necessary information processed by Europol for the purposes set out in article 18 (2) of the Regulation. At the same time, Europol will inform the national units of the team, as well as those of the Member States that provided the information.¹⁰

⁸ Bogdan Birzu, *op. cit.*, pp. 160-164.

⁹ Published in the Official Monitor of Romania, Part I. no. 517 of 08.07.2016.

¹⁰ The provisions of art. 18 par. (2) of the European legal instrument deals with the purposes for which personal data can be processed.

Europol shall be able to process them for the purposes provided in the European legislative act, with the agreement and under the responsibility of the involved Member State.

If Europol is of the opinion that setting up a joint investigation team would be more valuable than an investigation carried out in a Member State, it may propose the establishment of a joint investigation team and arrange for the necessary assistance to be provided to the concerned Member States.

We should mention that “Europol does not have the power to participate or to order coercive measures. We have here first of all the detention that may also be ordered by the judicial police bodies.”¹¹

Thus, Europol may request its competent national authorities through its national units to initiate, direct and facilitate the investigation of an offense falling within the scope of its objectives or coordinate the relevant criminal investigation.

Regarding the decisions made by the competent authorities of the requested States, they shall be communicated by Europol National Units at the request of Europol.

There is no doubt that the competent authorities of the Member States are not required to comply with Europol's request.

However, in case where the requested competent authorities shall decide not to comply with a request made by Europol, they shall inform Europol the reasons which led to the decision without undue delay, preferably within one month of receipt of the request.

The reasons for the State's refusal may not be specified in two situations expressly provided by the European legal instrument, namely:

- would be contrary to the essential interests of the security of the Member State concerned; or
- would jeopardize the success of an ongoing investigation or the safety of a person.

Europol shall immediately inform Eurojust of any request made under those provisions and of any decision by a competent authority of a Member State at the request of Europol.

In Romanian law this institution (Joint Investigation Teams) is governed by the provisions of Law no. 302/2004 on International Judicial Cooperation in Criminal Matters, as subsequently amended and supplemented.¹²

We state that in order to comply with the obligations assumed before Romania's accession to the European Union, Romania ratified the Agreement on Cooperation between Romania and the European Police Office signed on November 25, 2003 in Bucharest, by Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office, signed in Bucharest on November 25, 2003.¹³

¹¹ Ion Rusu in Alexandru Boroi (coord.), Ion Rusu, Minodora-Ioana Rusu, *op. cit.*, p. 943.

¹² Published in the Official Monitor of Romania, Part I, no. 594 of 1 July 2004, republished in the Official Monitor of Romania, Part I, no. 377 of 31 May 2011.

¹³ Published in Official Monitor of Romania, Part I, no. 498 of 2nd June 2004.

Subsequently, on the background of the evolution of transnational crime, the amendments and completions of the European legislation in this field, the creation of a coherent normative framework establishing clear rules of cooperation between the competent Romanian judicial authorities and Europol, Law no. 55/2012 on Romania's co-operation with the European Police Office (Europol).¹⁴

According to the provisions of the internal normative act mentioned above, the joint investigation teams are constituted on the basis of art. 182 of Law no. 302/2004 on international judicial cooperation in criminal matters, republished with the subsequent amendments and completions, in two distinct situations, namely:

- if deemed necessary by an analysis of the Romanian judicial bodies; and,
- at the request of Europol.

Under the conditions where it is incident one of these situations, the Romanian competent judicial bodies shall propose to the authorities of the other participating States that Europol staff shall be included in the respective teams if the subject of the investigations concerns offenses falling within the competence of Europol.

At the request of Europol, the Romanian public authorities agree to include the information provided by these joint investigation teams in processing system of information at the level of Europol.

If Europol staff caused damage during their participation in the Joint Investigation Team, their repair is done under the same conditions as the injury suffered by the Romanian members of the Joint Investigation Team.

The competent Romanian authorities shall prioritize Europol's requests for initiating, conducting and coordinating criminal investigations, specifying whether the requested inquiries will be initiated or not.

If the Romanian authorities decide not to comply with a request from Europol, the form of the reply also mentions the reasons behind this decision, except for the two express situations provided in the European legal instrument that we referred to earlier.¹⁵

All correspondence with Europol is carried out through the Europol National Unity.

Accordingly, according to the provisions of the Romanian law¹⁶, joint investigation teams can be established and can operate on the territory of Romania and other states in order to facilitate criminal investigations. The procedures governing the functioning of these teams, such as the composition, duration, location, organization, functions, purpose and conditions of participation of team members in the investigative activities, shall be established by written agreement.

¹⁴ Published in the Official Monitor of Romania, Part I, no. 185 of 22 March 2012, republished in the Official Monitor of Romania, Part I, no. 206 of March 24, 2014.

¹⁵ Ion Rusu in Alexandru Boroi (coord.), Ion Rusu, Minodora-Ioana Rusu, *op. cit.*, pp. 954-955.

¹⁶ Art. 182 para. (1) of the Law no. 302/2004 on International Judicial Cooperation in Criminal Matters, republished, as subsequently amended and supplemented.

The national member of Eurojust or his deputy may participate in the activities of the Joint Investigation Team.

At the level of Romania, in relation to the Member States of the European Union, the agreement is concluded by the first prosecutor or the prosecutor general of the prosecutor's office in which the prosecutor carrying out or supervising the prosecution is carrying out the activity, or when there is no criminal proceedings in progress on the territory of Romania, irrespective of the nature of the offense, by the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice or by the prosecutor appointed by him. In relation to states that are not members of the European Union, the agreement is concluded by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice or the prosecutor appointed by him.

We note that the text in question does not mention anything on the competence of initiating or approving a joint investigation team for offenses which are in the competence of D.I.C.O.T. and D.N.A.

2.2 National Europol units

The Member States of the European Union cooperate with Europol in fulfilling their tasks under the Framework Regulation instrument (the Regulation under review).

At the level of each member state it is established a national unit representing the liaison body of Europol and the competent authorities of the State, a unit which shall be headed by a head appointed by the Member State concerned.

The competent authorities of each Member State will ensure that the national unit set up is competent in relation to its internal law to carry out the tasks assigned to the national units, according to the legal framework, in particular as regards access to national law enforcement data and other relevant data needed to achieve co-operation with Europol.

The manner in which the organization and functioning and the organization chart of the national unit is set by each Member State in relation to its domestic law.

In accordance with the provisions of the European framework legal instrument, the national unit of each Member State shall constitute the liaison unit between Europol and the competent judicial authorities of that State.

In relation to the evolution of the situation in a specific case, the competent judicial authorities of the Member States may contact directly Europol. The national unit shall receive from Europol all information exchanged in the course of direct contacts between Europol and the competent authorities, unless the national unit states that it does not need to receive such information.

Each Member State, either directly or through its national unit, will execute the following:

- provide Europol with the necessary information for the achievement of its objectives, including information on the forms of prevention or combating crime, which the Union considers to be a priority;
- ensure communication and effective cooperation with all relevant competent authorities with Europol;
- increase the level of information on Europol's activities;
- ensure compliance with national law when transmitting information to Europol, in accordance with the provisions of Art. 38 para. (5) of the framework regulatory act examined.¹⁷

According to the provisions of art. 7, par. (7) of the European legal instrument, without bringing prejudice to the exercise of the responsibilities that incumbent upon Member States with regard to the maintenance of public order and peace and the protecting the internal security, the Member States are not under no obligation to provide information in accordance with the provisions of paragraph 6) letter a) if they:

- would be contrary to the essential interests of the security of the Member State concerned;
- endanger the success of an ongoing investigation or the safety of a person; or
- would disclose information about organizations or specific activities of national security intelligence services.

We should mention that the information referred to is information necessary for the fulfillment of Europol's objectives¹⁸, including information on the forms of crime the prevention or fight against which is considered to be a priority for the Union.¹⁹

Other information that does not cover by the abovementioned areas concerning Europol's objectives will be provided without reservation.

Heads of Europol national units meet periodically to discuss and address, as a matter of priority, issues arising in the context of their operational cooperation with Europol.

Europol shall draw up an annual report on the information provided by each Member State on the basis of the quantitative and qualitative assessment criteria defined by the Management Board. This report is sent to the European Parliament, the Council, the Commission and the national parliaments.

¹⁷ Art. 7 par. (6) of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016; art. 38, para. (5) of the statutory instrument to which reference is made, provides: Responsibility for the legality of the data transfer lies with: a) the Member State which provided Europol personal data; (b) Europol, in the case of personal data provided by Europol to Member States, third countries or international organizations.

¹⁸ Bogdan Bîrzu, *op. cit.*, pp. 160-162.

¹⁹ See also Ion Rusu in, Alexandru Boroi (coordonator), Ion Rusu, Minodora-Ioana Rusu, *op. cit.*, p. 955.

As far as Romania is concerned, the Europol National Unity is a specialized structure, without legal personality, organized within the General Police Inspectorate - the International Police Cooperation Center. The Europol National Unit is designated by Romanian law as the only point of contact with Europol.

According to the provisions of the Romanian special law²⁰, the National Europol Unit has the following main tasks:

- a) provide Europol, on its own initiative, with the operational data and information, after own analysis, which it deems necessary to carry out the Europol tasks referred to in art. 5 of the Europol Decision;
- b) responds to requests for operational and advisory data and information received from Europol;
- c) update the operational data and information provided to Europol;
- d) evaluate, at the request of the competent Romanian authorities, operative data and information and transmit to them the outcome of the assessment;
- e) to address to Europol, on its own initiative or at the request of a competent Romanian authority, requests for counseling, operative data, intelligence and analysis;
- f) provide Europol with information for storage in its databases;
- g) exchange information with Europol liaison officers of other Member States, including with regard to offenses outside Europol's competence, in accordance with the law on international police cooperation;
- h) ensure compliance with the legal provisions on operational data and information communicated in the framework of its own information exchange activities with Europol or Europol liaison officers of other Member States.

It is noted that the abovementioned provisions are obsolete because they refer to art. 5 of the Europol Decision, normative act repealed by the provisions of art. 75 par. (1) of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law-Making Cooperation (Europol) and replacing and repealing Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA of the Council.

2.3 Liaison officers

In order to ensure an efficient and operative cooperation activity, each national unit will designate a liaison officer to be attached to Europol. As a rule, they are subject to the national law of the Member State which has appointed them.

Liaison officers shall be national liaison offices at Europol and shall be trained by national units to represent their interests within Europol in accordance

²⁰ We consider the Law no. 55/2012, republished, on Romania's co-operation with the European Police Office (Europol).

with the national law of the Member State which designated it and the provisions applicable to the Europol administration.

Liaison officers shall assist in the exchange of information between Europol and the Member States which have designated it.

They also, in accordance with their national law, assist with the exchange of information between Member States and liaison officers of other Member States, third countries and international organizations. As far as Europol's infrastructure is concerned, it may be used in the exercise of its functions in accordance with national law for such bilateral exchanges and for offenses not covered by the scope of Europol's objectives. The entire information exchange activity must be carried out in compliance with European Union law and national law.

Under the Romanian law, provisions concerning liaison officers are contained in art. 8 of the Law no. 55/2012 on Romania's co-operation with the European Police Office, normative act to which we have also referred previously.

The Europol liaison officers are appointed by the Minister of the Interior at the proposal of the Inspector General of the General Police Inspectorate. They come from the police officers and are sent to a permanent mission abroad in positions assimilated to domestic affairs attachés with diplomatic status. Their training is carried out by the Europol National Unit before starting working at the Romanian Bureau of Liaison with Europol and representing the interests of this institution, according to the provisions of the Romanian law and of the European normative instruments regulating the activity of Europol.

Europol liaison officers have the following main tasks:

- provide Europol with information from the National Europol Unit or from the competent Romanian authorities;
- provide the Europol National Intelligence Unit with information from Europol;
- cooperate with Europol staff in providing information and advice;
- supports the exchange of information between the Europol National Unit and the liaison officers of other Member States with Europol;
- exchange information with Europol national units in other Member States, including on offenses not covered by Europol, under the terms of the law on international police cooperation;
- participate in the activities of the analytical groups of which they are part, constituted in accordance with the provisions of art. 14 par. (2) of the Europol Directive.

As with Joint Investigation Teams, we note that the provisions of the law are outdated and are not in line with the provisions of the European normative instrument under examination.

3. Some critical opinions and *de lege ferenda* proposals

Examination of the provisions regulating the participation in joint investigation teams, Europol national units and liaison officers allow us to express

critical views both in terms of the provisions of the European normative act and those of the Romanian special law.

As far as the provisions of the European legislative act are concerned, with a strict reference to how the two forms of judicial assistance are regulated, we should point out that, in our opinion, Europol's competences have to be diversified in order to give to this European institution wider competences.

We have here the possibility of granting wider competences in terms of tracing and catching wanted persons, especially those suspected of terrorism, arms trafficking, ammunition, explosive and radioactive materials and trafficking in human beings.

We also appreciate the need to complement the European legal instrument with some indications that Europol should be involved in joint investigation teams for certain offenses considered as being serious.

As far as the Romanian law is concerned, we consider that this is outdated, in that it contains direct references to the provisions of the Europol Decision, a European normative instrument which is currently abrogated.

Under these circumstances, *de lege ferenda*, we propose to amend and complete Law no. 55/2012 on Romania's co-operation with the European Police Office, with provisions to be agreed with those of the examined European normative instrument.

Only as example, we should mention that even the title of the law is no longer in line with the current European regulation, because the new name of Europol is the European Union Agency for Law Enforcement Cooperation, the old name, the European Police Office (as stipulated and in Romanian law), currently being excluded.

4. Conclusions

The examination highlights both the role of Europol in the complex work of preventing and combating cross-border crime and the importance of the two forms of European judicial assistance in criminal matters, namely joint investigation teams and liaison officers at Europol level.

At the same time, the examination of the European normative act and the way its provisions are transposed into the Romanian law also revealed some dysfunctions regarding the non-conformity of the Romanian law with the European law.

On the other hand, we appreciate that the role and importance of Europol will increase in the coming period, which will lead to the intensification of the specific activities of this agency, the ultimate goal being to contribute to the achievement of the European Union's objective of ensuring an area of freedom, security and justice.

Last but not least, we appreciate that, on the basis of the proliferation of crime of all kinds, it is necessary to amend and supplement the European normative

act, in order to give Europol increased powers, without prejudice to the domestic law of each state in which criminal proceedings are conducted.

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